No. 13893

United States Court of Appeals
FOR THE NINTH CIRCUIT.

CLAIR LAVERNE WHITE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division

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JURISDICTION

This is an appeal from a judgment of conviction rendered by the United States District Court for the Southern District of California, Central Division. [I 27-28][1] The

[1] **Numbers appearing herein within "brackets" preceded by a Roman numeral I refer to the pages of the typewritten transcript of the record filed by the clerk of the United States District Court; when preceded by Roman numeral II the figures appearing within brackets refer to the stenographer's transcript of the proceedings at the trial.**

district court made no findings of fact or conclusions of law. No reasons were given by the court for the judgment rendered. The court merely found the appellant guilty as charged in the indictment. [I 23] Title 18, Section 3231, United States Code, confers jurisdiction in the district court over the prosecution of this case. The indictment charged an offense against the laws of the United States. [I 2-3] This Court has jurisdiction of this appeal under Rule 37(a) (1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. [I 29]

STATEMENT OF THE CASE

The indictment charged the appellant with a violation of the Universal Military Training and Service Act. It was alleged that, after registration and final classification, the appellant was ordered to report for induction. It is then alleged that he "knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do." [I 2-3] Appellant was arraigned and pleaded not guilty. [I 4] Trial by jury was waived and he consented to trial by the court. [I 6]

The secret investigative FBI report was subpoenaed. The Government made a motion to quash the subpoena. The court overruled the motion.

The case was called for trial and evidence was heard. [II 1-58] A motion for judgment of acquittal was made at the close of the evidence. [I 17-21] The motion was denied. [I 23; II 53] The court found the appellant guilty as charged. [I 23; II 53] A motion for new trial was filed. [I 25-26] The motion for new trial was denied. [I 27; II 55] The court sentenced appellant to four years in the custody of the Attorney General. [I 27-28; II 58] Notice of appeal was duly and timely filed. [I 29] The transcript of the record including statement of points relied on has been filed in this Court.

THE FACTS

Clair Laverne White was born July 13, 1931. (1)[2] He registered with his local board in Los Angeles on July 14, 1949. (2, 3) He was mailed a classification questionnaire on October 20, 1950. (3, 5) He filled out this questionnaire properly and filed it with the local board on November 9, 1950. (4, 5)

The name and address of the appellant were shown in the questionnaire. (6) In Series VI he answered that he was a minister of religion. He stated that he customarily and regularly served as such. He added that he was a minister of Jehovah's Witnesses. (7)

He stated that he was also a punch press operator employed by the North Hollywood Tool and Manufacturing Company. (8) He worked 48 hours per week and made $1.20 per hour at this job. (9) He signed the conscientious objector blank under Series XIV. (11)

The local board mailed to White a special form for conscientious objector on November 13, 1950. (12, 15) White filled out the form and returned it to the local board on November 20, 1950. (15)

He signed Series I (B) in the special form for conscientious objector. By so doing he certified that he was conscientiously opposed to both combatant and noncombatant military service. He answered that he believed in the Supreme Being. He described the nature of his beliefs that involved duties which were superior to those owed to the state. He said that he was obliged to render "pure and undefiled worship of the most high God. Yes, I must obey God in all things." (15)

He cited several scriptures supporting his stand as a conscientious objector. He stated that he got his belief from his parents. He showed that they had taught him the beliefs of Jehovah's Witnesses to be found in the Bible since child-

[2] **Figures appearing in "parentheses" refer to pages of the draft board file, Government's Exhibit No. 1. The pages are numbered in longhand at the bottom and the numbers are circled.**

hood. (16) He stated that he relied upon his father for religious guidance. (16)

He answered that he did not believe in the use of force under any circumstances. (16) By studying the Scriptures and telling others what he believed as a minister he stated that this demonstrated his depth of conviction and consistency of belief. He said that he gave public expression at every opportunity concerning his belief in the Almighty God. (16)

He listed the schools that he had attended, his employers and his places of residence. (13, 16) He gave the name and address of his parents and showed that they were Jehovah's Witnesses. (9, 13) He showed that he was not a member of any military organization but that he was a member of a religious organization. (19) He said that he was one of Jehovah's Witnesses and that the Watchtower Bible and Tract Society was the legal governing body of that organization. (19) He showed that he had become a member by being baptized on August 24, 1941, at Titusville, Pennsylvania. (19) He gave the address of the church and listed, as the presiding minister, Frank Pisel.

He described the belief of Jehovah's Witnesses in respect to bearing arms. He said that they objected and he objected because "we obey the laws of the land only as long as they do not conflict with God's laws." He then quoted Acts 5:29 as follows: "We ought to obey God rather than men." (19) He then gave a list of names for references. (20) He signed the conscientious objector form at the end. (20)

On January 15, 1951, the local board classified White in Class I-A-O. This classification made him liable for noncombatant military service in the armed forces. (12) He was notified of this classification. (12) He wrote a letter to the board requesting a personal appearance. (12, 23) The local board notified him to appear before it on January 29, 1951. (12) He appeared for personal appearance at the time and place fixed by the board. (22)

A short memorandum was made of the personal appearance by the local board. (22) After the hearing was over the board concluded not to reopen his case. White was continued in Class I-A-O. (12) The local board, however, noted that the case was reopened "automatically on appearance." (24) In the minutes it is stated that White was "in defense work—case not reopened. Continued I-A-O." (12)

On January 30, 1951, White's mother wrote a letter to the local board stating in detail his beliefs as one of Jehovah's Witnesses and emphasizing his stand as a conscientious objector. She requested that he be classified as a minister. (25-27)

On February 7, 1951, White wrote a letter of appeal to the board. He argued his conscientious objector stand and stated that he was neutral to the wars between the nations. (28-30) The local board notified him to appear for a physical examination. (31) On March 1, 1951, he wrote a letter to the board and sent in affidavits corroborating his stand as a conscientious objector and minister. (32-35)

The report of the physical examination was received by the board. On March 16, 1951, the local board notified White of his physical acceptability for service in the armed forces. (37) The board of appeal reviewed the file on April 11, 1951, and made a preliminary determination that White was not entitled to the conscientious objector classification. This order caused the file to be referred to the Department of Justice for appropriate inquiry and hearing. (12) The file was on that date forwarded to the Department of Justice. (38)

After an extensive investigation by the FBI a secret report was made. This report of the investigation was forwarded to the hearing officer. [II 38]

White was notified on February 6, 1952, to appear before the hearing officer for a hearing on March 6, 1952. (41) He appeared. The hearing officer asked him some questions. White told the hearing officer that none of his brothers and

sisters went into the army. [II 39] He showed him that he had been one of Jehovah's Witnesses since he was three years old. [II 39] He testified that he went to church three times a week. He told the hearing officer that he would not kill, even if the Russians came into this country and killed his parents. He stated that he would trust in the power of Almighty God to resurrect his parents if they were killed. [II 39-40]

He stated that he would not do work of any national importance and would not help in the war effort in any manner. [II 40] He asked the hearing officer if there was any unfavorable evidence and the hearing officer replied that there was not any unfavorable evidence in the FBI report. [II 40] At the close of the hearing, the hearing officer told him not to worry about his claim for classification as a conscientious objector. [II 41]

The hearing officer then made a report to the Department of Justice. He found that White worked in a machine shop making tools and dies. He also found that White worked on war contracts from 1949 to 1951. He said that White had been brought up in the faith of Jehovah's Witnesses and that he insisted his conscientious objections were predicated on religious training and belief. He found that White went to church two or three times a week. He also said that White preferred to go to prison rather than go to the army. The hearing officer said: "It is quite obvious that these people are rather fanatical in their beliefs. Statements were made that they would not assist in any material way, but only spiritually in case of necessity." (42)

The hearing officer concluded that there "is no question in my mind but that the registrant is sincere, but from all of the evidence I would recommend that he be placed in noncombatant service, or I-A-O." (43)

The Attorney General followed the recommendation of the hearing officer and wrote the board of appeal that White should be classified in Class I-A-O. (44) On May 13, 1952, the board of appeal, classified White in Class I-A-O. (12,

39) On May 19, 1952, the file was returned to the local board and White was notified of the classification. (12)

On May 29, 1952, White wrote a letter of appeal to the National Director. He requested that the National Director appeal his case to the President. This letter, dated May 27, 1952, was filed with the board on the 29th. (12)

The local board reviewed the file on June 9, 1952, and determined to take no action. (12) Appellant was ordered to report for induction on July 7, 1952. (12, 47) He did not report. The local board wrote him a letter to report within five days after July 11, 1949. (49) On July 14, 1952, the board ordered him to report for induction by letter on July 18, 1952. (49) White reported on July 18, 1952, and refused to submit to induction. (50) He signed a statement refusing to be inducted. (52)

QUESTIONS PRESENTED AND HOW RAISED

I.

The undisputed evidence showed that appellant possessed conscientious objections to participation in both combatant and noncombatant military service. He showed that these objections were based on his sincere belief in the Supreme Being. He showed that his obligations to the Supreme Being were superior to those owed to the Government. The file showed that his beliefs were not the results of political, philosophical, or sociological views but that they were based solely on the Word of God. (15-20)

The local board classified White as a conscientious objector liable for performance of noncombatanat military service in the armed forces. (12) On a hearing before the board the I-A-O classification was continued. (12) There was no evidence in the file showing that White was willing to do noncombatant military service as a conscientious objector.

The case was referred to the Department of Justice for appropriate inquiry and hearing. The secret investigative

report was favorable to the claim of White. The hearing officer found that White "would not assist in any material way." (42) The hearing officer found White to be sincere but recommended that he be ordered to do noncombatant service. (43) The appeal board classified White in Class I-A-O. He was made liable for noncombatant military training and service in the armed forces. (12, 39)

In the motion for judgment of acquittal it was contended that the denial of the conscientious objector and the recommendation of the hearing officer of the Department of Justice were without basis in fact, arbitrary, capricious and contrary to law. [I 19]

In the motion for new trial it was complained that the court erred in denying the motion for judgment of acquittal. [I 25]

The question presented here, therefore, is whether the denial for claim for classification by the appeal board and the recommendation by the Department of Justice were arbitrary, capricious and without basis in fact.

II.

Appellant's case was referred to the Department of Justice for appropriate inquiry and hearing. Following a secret investigation by the FBI a report was made to the hearing officer of the Department of Justice. White was called before the hearing officer for a hearing. He asked the hearing officer if there was anything unfavorable in the secret investigative report of the FBI. The hearing officer said there was no unfavorable evidence in the report. [II 40]

At the trial White caused to be subpoenaed the secret investigative report made by the FBI. A motion to quash was made by the Government and denied. [II 22] The hearing officer had the secret investigative report of the FBI before him. [II 38] The FBI report was marked for identification. [I 15-16; II 44-45, 46, 47]

Appellant moved that the FBI report be put into evidence. The motion was denied. [I 16; II 45] The trial court

inspected the secret investigative report. He found that from an investigation and examination it was material on whether the hearing officer had stated the truth when he said that there was no unfavorable evidence in the report. [II 47-48]

The trial court excluded the FBI report from evidence under the authority of Order 3229 of the Attorney General. [II 48]

In the motion for judgment of acquittal it was contended that appellant had been deprived of his rights to due process of law by failure of the court to compel the production of the secret investigative reports at the trial. [I 21] In the motion for new trial complaint was made of the error of the court in not receiving into evidence and not allowing appellant to examine the secret investigative report of the FBI for the purpose of determining whether or not there had been a fair and adequate summary made of the adverse evidence upon the occasion of the hearing before the hearing officer. [I 25-26]

The question presented here, therefore, is whether the trial court committed reversible error when it excluded from evidence the secret investigative report of the FBI and denied appellant the right to have the report produced for the purpose of determining whether or not a fair and adequate summary of the adverse information appearing in the report was given by the hearing officer to appellant.

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motion for judgment of acquittal duly made at the close of all the evidence.

II.

The district court erred in convicting the appellant and entering a judgment of guilt against him.

III.

The district court erred in denying the motion for new trial.

IV.

The district court committed reversible error upon the trial when it excluded the secret investigative FBI report and denied appellant the right to have it used at the trial to determine whether or not the hearing officer made a fair and adequate summary of the adverse evidence appearing in the report as required by due process of law, the act and the regulations.

SUMMARY OF ARGUMENT

POINT ONE

The board of appeal had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant and it arbitrarily and capriciously classified him in Class I-A-O.

Section 6(j) of the act (50 U. S. C. App. § 456(j), 62 Stat. 609) provides for the classification of conscientious objectors. It excuses persons who, by reason of religious training and belief, are conscientiously opposed to participation in war in any form.

To be entitled to the exemption a person must show that his belief in the Supreme Being puts duties upon him higher than those owed to the state. The statute specifically says that religious training and belief does not include political, sociological or philosophical views or a merely personal moral code.

Section 1622.14 of the Selective Service Regulations (32 C. F. R. § 1622.14) provides for the classification of conscientious objectors in Class I-O. This classification carries with it the obligation to do civilian work contributing to the maintenance of the national health, safety, or interest.

The undisputed evidence showed that the appellant had sincere and deep-seated conscientious objections to participation in war. These objections were to both combatant and noncombatant military service. These were based on his belief in the Supreme Being. His belief charged him with obligations to the Almighty God higher than those to the state. The evidence showed that his beliefs were not the result of political, sociological, or philosophical views. He specifically said they were not the result of a personal moral code. The file shows without dispute that the conscientious objections were based upon his religious training and belief as one of Jehovah's Witnesses.

The appeal board, notwithstanding the undisputed evidence, held that appellant was not entitled to the conscientious objector status.

The denial of the conscientious objector classification is arbitrary, capricious and without basis in fact.—*United States* v. *Alvies,* 112 F. Supp. 618 (1953); *Annett* v. *United States,* 205 F. 2d 689 (10th Cir. 1953); *United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky. 1952); *United States* v. *Pekarski,* — F. 2d — (2d Cir. Oct. 23, 1953).

POINT TWO

The court below committed reversible error when it refused to receive into evidence the FBI report and excluded it from inspection and use by the court and the appellant upon the trial of this case.

Upon the trial appellant subpoenaed the secret investigative report of the FBI. A motion to quash was made by the Government. This was denied. At the trial the court permitted the report to be marked for identification and received as a sealed exhibit after the trial court made an inspection of the exhibit. The trial court found the secret FBI report to be material but refused to permit it to be used as evidence.

The trial court committed grievous error when it re-

fused to permit the exhibit to be used as evidence. He merely received the exhibit and permitted it to be marked for identification and inspected it himself. He excluded it and permitted the exhibit to come before this Court in sealed form for the limited purpose of determining whether or not he was in error in excluding the exhibit.

The hearing officer told White that the FBI report was favorable to him and that he would not have to worry about his conscientious objector claim. It may be argued that because of this it leaves no basis for demanding the report to be produced at the trial. But the statement by the hearing officer does not cure the error of the court below. It was for the court below to say whether the statement made by the hearing officer is true.—See the last paragraph of the opinion in *United States* v. *Packer,* 200 F. 2d 540 (2d Cir.).

White requested notice of the adverse evidence. The hearing officer told him there was nothing unfavorable in the report. The hearing officer nevertheless recommended against the full conscientious objector claim. The refusal to give a summary of the FBI report to White and the unfavorable recommendation commands that the statement of the hearing officer that there was nothing unfavorable in the report not be relied upon to hold as harmless error the action of the court below. In view of the judicial function put on the trial court to determine if a summary was required neither it nor this Court can rely upon the statement of the hearing officer that the report was favorable as a basis for refusing the production of the FBI report.

The claim of privilege is not applicable here. The Government waived its rights under the order of the Attorney

General, No. 3229, when it chose to prosecute appellant in this case. The FBI report was found to be material by the trial court. The judicial responsibility imposed upon the trial court to determine whether a fair and just summary was required to be given to the appellant overcomes and outweighs the privilege of Order No. 3229 of the Attorney General.—See *United States* v. *Andolschek,* 142 F. 2d 503 (2d Cir.); *United States* v. *Krulewitch,* 145 F. 2d 87 (2d Cir.); *United States* v. *Beekman,* 155 F. 2d 580 (2d Cir.); *United States* v. *Cotton Valley Operators Committee,* 9 F. R. D. 719 (W. D. La. 1949).

The Government must be treated like any other legal person before the court. It has no special privileges as the king did before the Stuart judges in England.—*Bank Line* v. *United States,* 163 F. 2d 133 (2d Cir.).

The secret investigative report was material. The trial court could not discard his judicial function in determining whether or not a full and adequate summary had been made of the secret investigative report without receiving the secret report into evidence and comparing it with the summary made by the hearing officer.—*United States* v. *Nugent,* 346 U. S. 1; *United States* v. *Evans,* August 20, 1953 (D. Conn.).

It is respectfully submitted, therefore, that the trial court committed error in excluding the FBI report from evidence and depriving appellant of the use of it upon the trial to ascertain whether the hearing officer made a full and fair summary of the secret FBI investigative report.

ARGUMENT

POINT ONE

The board of appeal had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant and it arbitrarily and capriciously classified him in Class I-A-O.

White certified in his conscientious objector form that he was opposed not only to combatant service but also to noncombatant service in the armed forces. The undisputed documentary evidence filed by him fully corroborated this claim. He answered that he did not believe in the use of force under any circumstances. The FBI investigative report failed to reveal that he was willing to perform either combatant or noncombatant service.

The evidence developed before the hearing officer showed he would not do any kind of military service and that he would not kill.

The hearing officer found that White preferred to go into prison rather than to go into the army. He found that White was sincere.

The hearing officer, notwithstanding the undisputed evidence and his findings of sincerity, arbitrarily and capriciously recommended that White be classified in Class I-A-O. This classification made him liable for military service as a noncombatant soldier. There was no evidence to support this. This finding was in direct contradiction to all the undisputed evidence.

The board of appeal followed the recommendation. The final classification by the appeal board also is without basis in fact, arbitrary and capricious.

The argument that has been made in the companion case of *Tomlinson* v. *United States,* No. 13,892, under Point One of that brief is adopted here and made a part of this brief as though copied at length herein. Since that case is a companion case to this one and will be argued at the same time,

it is proper to refer to the argument in that brief. It is requested that the Court here consider that argument as the argument in behalf of White.

While the hearing officer does not give the board of appeal the precise reason why he recommended the I-A-O classification, it may be assumed that he recommended that White be put into the army as a noncombatant soldier because he was willing to work in a machine shop that at one time had a war contract. The hearing officer found that White worked on war contracts from 1949 to 1951.

That White may have worked on war contracts does not in any way constitute basis in fact for the I-A-O classification. That classification still remains arbitrary and capricious. There is nothing in the act or the regulations that authorizes the draft board to order a man to do noncombatant military service because he is willing to work on a war contract.

The act and the regulations are specific as to what constitutes a conscientious objector to both combatant and noncombatant military service. Nowhere in the act or in the regulations is there any basis for the assertion that performance of work on war contracts allows the draft board to classify a registrant as a noncombatant soldier. As long as a registrant can prove that he has conscientious objections to military service, both combatant and noncombatant, he is entitled to the full conscientious objector classification. This is true regardless of what sort of work he does. Whether he contributes directly or indirectly to the war effort is entirely immaterial.

If the position that one who performs work that contributes to the war effort is not entitled to the conscientious objector status, then it will become impossible for any conscientious objector ever to get the classification. Even a person who pays income tax or other tax to the Federal Government is contributing directly to the war effort. The money that he pays in taxes is used for the financing of the

military machine of this nation. Congress did not intend to forfeit the conscientious objections on such a vague and indefinite basis. Congress defined what a conscientious objector is. As long as a person meets that definition and fits the statute and regulations, the fact that he might do work of any sort is wholly irrelevant and immaterial. The classification here, therefore, that White should be ordered to do noncombatant military service in the armed forces because he had worked on war contracts is arbitrary and capricious.

While the Department of Justice did not make a big point about White working on war contracts in the machine shop, it may be argued in this Court by the Government that this was basis in fact for the classification of I-A-O that was given to him. Neither the act nor the regulations makes the type of work a person does a criterion to follow in determining his conscientious objection. The only questions for determination of conscientious objection are (1) does the person object to participation in the armed forces as a soldier? (2) does he believe in the Supreme Being? (3) does this belief carry with it obligations to God higher than those owed to the State? (4) does his belief originate from a belief in the Supreme Being and not from political, sociological, philosophical, or a personal moral code? White's case commands affirmative answers to all these questions. White, therefore, fits the statutory definition of what a conscientious objector is.

It is entirely irrelevant and immaterial to hold that there was basis in fact for the I-A-O classification because White had worked in a machine shop and worked on war contracts. This was not an element to consider. It was no basis in fact for the classification given of I-A-O. It was also no basis in fact for the denial of the I-O classification. It did not impeach or dispute in any way what he said in his questionnaire. All of the documentary evidence that he submitted indisputably established that he was opposed to

both combatant and noncombatant military service. The law does not authorize the draft boards nor the Government to invent ficticious and foreign standards, not authorized by the statute, and then use them to deny the privileges that are granted by the statute and the regulations.—*Annett* v. *United States,* 205 F. 2d 689 (10th Cir. June 26, 1953); *United States* v. *Alvies,* 112 F. Supp. 618 (N. D. Cal. S. D. 1953); *United States* v. *Graham,* 109 F. Supp. 377, 378 (W. D. Ky. 1952); *United States* v. *Everngam,* 102 F. Supp. 128, 131 (D. C. W. Va. 1951).

The question of employment and work performed by one who claims to be a conscientious objector becomes material only when it is shown that the type of work done by him is of a combatant nature. The Congress of the United States provided for two kinds of conscientious objectors. One is a person who has objections only to performance of combatant service but who is willing to go into the armed forces and do noncombatant service. He is recognized as a conscientious objector. He is made to wear a uniform and do military service except that of a combatant nature. This type of conscientious objector does not have his conscience questioned because of his willingness to perform work or services in the army. It is submitted also that Congress did not intend to forfeit the claim for classification made by the conscientious objector to both combatant and noncombatant military service because of the kind of work that he does on the outside of the armed forces. Neither the law nor the regulations disqualify any conscientious objector on such grounds.

A reasonable interpretation of the act and the regulations does not allow the type of employment to become relevant as to whether or not there was basis in fact for the denial of the I-O classification. In any event, it certainly is no basis in fact for the I-A-O classification. If the I-A-O classification is given because of the type of work that is performed, then that classification is arbitrary and capricious.

The documentary evidence submitted by the appellant establishes that he had sincere and deep-seated conscientious objections against combatant and noncombatant military service which were based on "his relation to a Supreme Being involving duties superior to those arising from any human relation." This material also showed that his belief was not based on "political, sociological, or philosophical views or a merely personal code," but that it was based upon his religious training and belief as one of Jehovah's Witnesses, being deep-seated enough to drive him to enter into a covenant with Jehovah and dedicate his life to the ministry.

There is no question whatever on the veracity of the appellant. The local board accepted his testimony. Neither the local board nor the appeal board raised any question as to his veracity. They merely misinterpreted the evidence. The question is not one of fact but is one of law. The law and the facts irrefutably establish that appellant is a conscientious objector opposed to combatant and noncombatant service.

In view of the fact that there is no contradictory evidence in the file disputing appellant's statements as to his conscientious objections and there is no question of veracity presented, the problem to be determined here by this Court is one of law rather than one of fact. The question to be determined is: Was the holding by the appeal board (that the undisputed evidence did not prove appellant was a conscientious objector opposed to both combatant and noncombatant service) arbitrary, capricious and without basis in fact?

There is absolutely no evidence whatever in the draft board file that appellant was willing to do military service. All of his papers and every document supplied by him staunchly presented the contention that he was conscientiously opposed to participation in both combatant and noncombatant military service. Never, at any time, did the appellant suggest or even imply that he was willing to per-

form any military service. He, at all times, contended that he was unwilling to go into the armed forces and do anything as a part of the military machinery.

The decision in *United States* v. *Alvies,* 112 F. Supp. 618, at pages 623-625, is applicable here. For the reasons there discussed the denial of the conscientious objector status here should be held to be without basis in fact.

It has been specifically held that an appeal by one of Jehovah's Witnesses from the conscientious objector classification requesting the minister's classification does not amount to a waiver of his conscientious objector claim. —*Cox* v. *Wedemeyer,* 192 F. 2d 920 (9th Cir.).

In situations similar to this the courts have uniformly held that the denial of the conscientious objector status is without basis in fact. (See *United States* v. *Konides,* No. 6216, District of New Hampshire, decided March 13, 1952, and *United States* v. *Konides,* No. 6264, District of New Hampshire, decided by Judge Woodbury, Circuit Judge, S. D., on June 23, 1953.) Copies of the opinions in these two cases accompany this brief. The *Konides* case was appealed to the National Selective Service Appeal Board twice. The board gave the I-A classification twice. After each classification there were orders to report for induction issued. Konides refused to be inducted twice, and each time an indictment was issued. Each time the indictments were dismissed because of the arbitrary denial of the conscientious objector status by the National Appeal Board.—See also *Annett* v. *United States,* 205 F. 2d 689 (10th Cir.); *United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky); *United States* v. *Pekarski,* — F. 2d — (2d Cir., October 23, 1953.).

The documents filed by appellant showed that when ordered to take up arms and fight in Caesar's army of this world Jehovah's Witnesses raise their conscientious objections to quit worshiping and serving Jehovah and thereby render unto Caesar the things that are God's. They take this stand as ministers with conscientious objections notwithstanding the fact that they are not pacifists.

Their conscientious objection to rendering military service to Caesar and in Caesar's army is based solely upon the commands of God's Word, the Bible, because they are his ministers or ambassadors for the new world of righteousness. (2 Corinthians 5:20) These are, therefore, conscientious objections to the performance of military service, which are based on Bible grounds. They are not pacifists. They are ministers conscientiously opposed to the performance of military service and any other service as a part of the war efforts of the nations of the Devil's world. "We know that we are children of God, and that the whole world lies in the power of the evil one." (1 John 5:15, *Weymouth*) They are, therefore, conscientious objectors and ministers, or ministers with conscientious objections.

There is no Scriptural authorization for Jehovah's Witnesses to bear arms in the service of the armed forces of any nation. Based on such training and belief Jehovah's Witnesses have conscientious objections to rendering such service. These objections are conscientiously based upon the law of Almighty God. That law, which is supreme, commands the true Christian minister to maintain an attitude of strict neutrality toward participation in international, national or local conflicts. This strict neutrality required by the supreme law is enforced by the commands of God which prohibit Jehovah's Witnesses from bearing arms or joining the armed forces of the nations of this world.

The fact that entering "Caesar's" armed forces is usually by conscription or forced service does not make it Scriptural. Regardless of whether the service is voluntary or by capitulation to commands, the situation is the same: the Christian minister of Jehovah thus gets unscripturally involved in the affairs of the nations of this world. He who is a friend of the world is an enemy of God. (James 4:4) A Christian minister does not take a course of action that is at enmity with God. He must follow in the footsteps of the Lord Jesus Christ and keep himself unstained by the world. (1 Peter 2:21; James 1:27, *An American Transla-*

tion) This he does by faithfully sticking to his post of duty as a minister and ambassador of Jehovah. He does not abandon it to participate in the controversies of this world of Satan.

It is true that Jehovah's Witnesses, as Christian ministers of God, reside in all the nations of the world. That fact does not mean that they are mixed up with the political affairs or the international controversies of such nations. They are in the world but not of it. Jesus prayed to his Father, "I have given your word to them, but the world has hated them, because they are no part of the world just as I am no part of the world." (John 17:14, 16, *New World Translation*) Jehovah, through Christ Jesus, has taken them out of the controversies and affairs of this world and drawn them into the exclusive business of preaching the good news of Jehovah's kingdom, and, as ambassadors to the nations of the world, carrying his warning message of the coming battle of Armageddon. "As for us, our citizenship exists in the heavens, from which place also we are eagerly waiting for a savior, the Lord Jesus Christ."—Philippians 3:20, *New World Translation;* John 15:19.

Jehovah's Witnesses must not entangle themselves in the affairs of this world. This is because they are soldiers in the army of Jehovah. "Endure hardness, as a good soldier of Jesus Christ. No man that warreth entangleth himself with the affairs of this life; that he may please him who hath chosen him to be a soldier." (2 Timothy 2:3, 4) As such Christian soldiers they fight to get the message about God's kingdom to every creature.—Mark 16:15.

Jehovah's Witnesses fight lawfully as such soldiers with all of the legal instruments, such as the constitutional rights, the statutory rights and other lawful rights granted to them by the nations of this world. They fight for freedom on the home front of the nation where they reside. They fight to defend and legally establish the good news before courts, ministers, officials, administrative boards and other agencies of governments. (Philippians 1:7, 16) They fight

with weapons that are not carnal. These are the mouth, the faculty of reason, the process of logic and the law of the land. "For though we walk in the flesh, we do not wage warfare according to what we are in the flesh. For the weapons of our warfare are not fleshly, but powerful by God for overturning strongly entrenched things. For we are overturning reasonings and every lofty thing raised up against the knowledge of God, and we are bringing every thought into captivity to make it obedient to the Christ."—2 Corinthians 10: 3-5, *New World Translation; Weymouth.*

In addition to the legal instruments that such Christian soldiers use, the great weapon that they wield among the nations of the earth is the "Sword of the spirit, which is the word of God." (Ephesians 6: 17) As soldiers of Jehovah and Christ they put on only the uniform that is prescribed by the law of God for Christian soldiers, his witnesses, to wear. That uniform is the armor of God. They have on the helmet of salvation and the breastplate of righteousness. They bear the shield of faith and wield the sword of the spirit, valiantly defending the righteous principles of Almighty God as commanded by the apostle Paul: "Put on the complete suit of armor from God that you may be able to stand firm against the machinations of the Devil, because we have a fight, not against blood and flesh, but against the governments, against the authorities, against the world-rulers of this darkness, against the wicked spirit forces in the heavenly places. On this account take up the complete suit of armor from God, that you may be able to resist in the wicked day and, after you have done all things thoroughly, to stand firm."—Ephesians 6: 10-13, *New World Translation.*

Since they are in the Lord's army of gospel preachers, they certainly have conscientious objections to serving in the armies of the evil world of Satan. As soldiers of God they cannot engage in the conflicts and warfare that flow

from the affairs of this world. They cannot be in two armies at the same time. Since they have been enlisted and serve in the Lord's army as his ministers, they must be at their missionary posts of duty. They cannot leave such posts in order to take up service in some other army. To quit the Lord's army and join the armies of Satan's world would make the soldiers of God deserters. Deserters are covenant-breakers. "Covenantbreakers . . . are worthy of death." (Romans 1:31, 32) The nations of this world cannot excuse the Lord's soldier from the penalty of death prescribed by Almighty God for deserters from his army. Caesar, not being able to relieve him from his covenant obligations or violations thereof, should not command him to become a renegade and deserter from the Lord's army to join his. That would result in his everlasting death. "And do not become fearful of those who kill the body but cannot kill the soul, but rather be in fear of him that can destroy both soul and body in Gehenna. Do not be afraid of the things you are destined to suffer. Look! the Devil will keep on throwing some of you into prison that you may be fully put to the test, and that you may have tribulation ten days. Prove yourselves faithful even with the danger of death, and I will give you the crown of life."—Matthew 10:28; Revelation 2:10, *New World Translation.*

In the Hebrew scriptures there are many cases where Jehovah's Witnesses fought and used violence and carnal weapons of warfare. They fought in the armies of the nation of Israel. At the time they fought as members of the armed forces of Israel it was God's chosen nation. They did not, however, enlist or volunteer in the armies of the foreign nations round about. They fought only in the armed forces of Israel, the nation of God. They did not join the armies of the Devil's nations. They maintained strict neutrality as to the warring nations who were their neighbors. When Jehovah abandoned and destroyed his chosen nation, he abandoned completely and forever the requirement that his peo-

ple fight with armed forces. Since then there has been no force used by his witnesses in any armed force.

There is no record in the Bible that any of the faithful Israelites enlisted in the armed forces of or fought in behalf of any of the Devil's countries or nations. To the contrary we have the instance of Abraham who maintained his neutrality. (Genesis 14) Also to the same effect is Zerubbabel, a soldier of Jehovah, who had a covenant to rebuild the temple. He refused to participate in the military conflicts that the world power, Medo-Persia, got into. He remained strictly neutral. For so doing he was accused of sedition and was prosecuted. Jehovah, however, blessed him for his neutral stand and for keeping to his post of duty under his covenant obligations.—Ezra 5:1-17; 6:1-22.

This position of strict neutrality, requiring refusal to participate in international conflicts between the forces of the nations of Satan's world, is also based on the Bible ground that Jehovah's Witnesses are ambassadors who serve notice of the advance of the great warrior, Christ, who is leading a vast army of invisible warriors of the armed force of Jehovah. (2 Corinthians 5:20; Revelation 19:14) He is advancing against Satan's organization, all of which, human and demon, he will destroy at the battle of Armageddon.

Jehovah's Witnesses do not participate in the modern-day armed forces of Jehovah. (2 Chronicles 20:15-17) Participation in that armed force is limited to the powerful angelic host, led by the invisible Commander, Christ Jesus. He rides at the front on his great white war mount. (Revelation 19:11-14) The weapons of the invisible forces of Jehovah are unseen but destructive weapons. Such will make the weapons of Caesar's armed forces of this world like children's toys in comparison. (Joel 3:9-15; Isaiah 40:15) Jehovah's weapons of destruction at Armageddon will be used by only his invisible forces, and not by Jehovah's Witnesses.

The weapons of warfare wielded by Jehovah's Witness-

es are confined to instruments that cannot be used in violent warfare. They use the "sword of the spirit, which is the word of God" as his Christian soldiers and ambassadors to warn the nations of this world of the coming battle of Armageddon. That will result in the defeat of all of Satan's armies and the wiping off the face of the earth of all the nations and governments of this evil world. "For it is my decision to gather nations, to assemble kingdoms, that I may pour out my wrath upon them, all the heat of my anger, for in the fire of my zeal all the earth shall be consumed." (Zephaniah 3:8, *An American Translation;* Jeremiah 25:31-33; Nahum 1:9, 10) They therefore cannot give up the weapons of their warfare and take up the weapons of violence in behalf of the nations of the world of Satan. The use of such weapons by Jehovah's Witnesses and their participation in any way in the international armed conflicts would be in defiance of the unchangeable law of Almighty God.

There is no record that the Lord Jesus or his apostles or disciples entered the armies of Caesar. The record of secular history shows that the early Christians at Rome refused to fight in Caesar's army. They were thrown to the lions and persecuted because of following the command of Christ Jesus to disassociate themselves from the affairs of the evil world.

The basis of objections to military service by followers of Christ Jesus, including the early Christians at Rome and their modern-day counterparts, Jehovah's Witnesses, can best be summed up by Jesus, who declared, "My kingdom is no part of this world. If my kingdom were part of this world, my attendants would have fought that I should not be delivered up to the Jews. But, as it is, my kingdom is not from this source." (John 18:36, *New World Translation*) Since Jehovah's Witnesses are not of this world, then, as the Lord Jesus did not, they cannot fight in or join up with the armed forces of the nations of this world represented by Caesar. They, accordingly, render unto God that which

is God's by remaining steadfastly in his army of witnesses and refusing to volunteer or submit to the armed forces of Caesar in international conflicts. They render unto Caesar all obligations of citizenship that do not require them to violate God's law. Thus they do as Jesus said: "Pay back Caesar's things to Caesar, but God's things to God."—Mark 12:17, *New World Translation.*

Jehovah's Witnesses do not advocate that the governments of this world do not have the right to raise armies from those other than the ministers of God. They do not teach others of Jehovah's Witnesses or people who are not to refuse to support the armed forces or volunteer for service. It would be wrong to do so. They render unto Caesar the things that are Caesar's by not teaching the subjects of Caesar to refuse to fight. Jehovah's Witnesses do not aid, abet or encourage persons who are not ministers with conscientious objections to resist the commands of Caesar. They do not, in fact, tell each other what to do or not to do. Each witness of Jehovah decides by himself alone what course he will take. His decision as to whether to render to God what is God's is dictated by his individual understanding of the law of God in the Word of Jehovah, the Bible. His decision is formed not by the written or printed word of the Watchtower Society or any person among Jehovah's Witnesses.

The draft act provides for the deferment of conscientious objectors, as well as the exemption of ministers of religion. Jehovah's Witnesses are entitled to claim the exemption granted to the ministers of God and the orthodox clergy. They are also entitled to the deferment extended to the conscientious objectors who refuse to participate in warfare based on religious training and belief notwithstanding the fact that they are not pacifists. In complying with such law by claiming such ministerial exemption and deferment they render to Caesar the things that belong to Caesar. They are therefore consistent in making their claim. They are conscientious objectors but not pacifists. In taking this stand

they continue and remain God's ministers, properly called the witnesses of Jehovah.

Jehovah's Witnesses do not consider the act unconstitutional. They believe that it is within the province of a nation to arm itself and resist attack or invasion. It is admitted that the Government has the authority to take all reasonable, necessary and constitutional measures to gear the nation for war and so lubricate the war machinery to keep it working effectively.

Conscription of manpower for the purpose of waging war is of ancient origin. Before the Roman Empire and early world powers, the nation of Israel registered men for military training and service. Complete exemption from military service and training was provided, however, for ministers and priests known as "Levites." Twenty-three thousand of the first registration were completely exempt according to statistics. Under this system of raising and maintaining an army the Jewish nation fought many battles and gained many victories. Since the destruction of the Jewish nation, Jehovah's Witnesses have been neither commanded nor authorized to conscript man power or wage wars. They are not organized as a nation in the world as were the Israelites. They are in the world as ambassadors to represent God's kingdom, as witnesses to proclaim The Theocracy, the only hope of the people of good will to obtain peace, prosperity, happiness and life. They neither oppose nor advocate opposition to or participation by others in war. Each one individually, for himself, determines what course he must take according to the perfect Word of God. As one of the "royal priesthood," Jehovah's Witnesses, as the Levites, lay claim to complete exemption from military service according to the provision of the act because they are ordained ministers of the gospel of God's kingdom. This position of strict neutrality is the position taken by everyone who fights not with carnal weapons and faithfully and strictly follows in the footsteps of Christ Jesus and preach-

es the gospel as did he and his apostles, according to the Holy Word of God.

History shows that the early Christians claimed exemption from military service required by the Roman Empire, because they were set apart from the world as a royal priesthood to preach God's kingdom. Hence they were neutral toward war. They claimed complete exemption from training and service, which was disallowed by the Roman Empire. Because they refused military service they were cruelly persecuted, sawn asunder, burned at the stake and thrown to the lions.—See Henry C. Sheldon, *History of the Christian Church,* 1894, Crowell & Co., New York, p. 179 *et seq.;* E. R. Appleton, *An Outline of Religion,* 1934, J. J. Little & Ives Co., New York, p. 356 *et seq.;* Capes, *Roman History,* 1888, Scribner's Sons, New York, p. 113 *et seq.;* Willis Mason West, *The Ancient World,* 1913, Allyn & Bacon, Boston, pp. 522-523, 528 *et seq.;* Capes, *The Roman Empire of the Second Century,* Scribner's Sons, New York, p. 135 *et seq.;* Ferrero & Barbagallo, *A Short History of Rome* (translated from Italian by George Chrystal), Putnam's Sons, New York, 1919, p. 380 *et seq.*

Congress did not intend to confer upon the draft boards or the district judge arbitrary and capricious powers in the exercise of their discretion. They have discretion to follow the law when the facts are undisputed. If there is a dispute, the boards have the jurisdiction to weigh the testimony. In the case of a denial of the conscientious objector status, if there is no dispute in the evidence and the documentary evidence otherwise establishes that the registrant is a conscientious objector, it is the duty of the court to hold that there is no basis in fact. It must conclude that there is an abuse of discretion, and that the classification is arbitrary and capricious. It is submitted that such is the case here. The undisputed evidence shows that the appellant is a conscientious objector entitled to the I-O classification. The denial of the classification is without basis in fact. The classification of I-A flies in the teeth of the evidence. Such

classification is a dishonest one, making it unlawful.—*Johnson* v. *United States,* 126 F. 2d 242, at page 247 (8th Cir.).

There is a district court opinion that bears directly upon the question involved here. This is the unreported oral opinion rendered by Judge Clifford from the bench, sitting in the United States District Court for the District of New Hampshire in cause No. 6216, *United States* v. *Konides,* March 13, 1952. In that case one of Jehovah's Witnesses was denied the conscientious objector status. The facts, as far as the evidence appearing in the file on the subject of conscientious objection is concerned, were identical to the facts in this case. A printed copy of the stipulation of fact and oral opinion rendered by Judge Clifford is here referred to and accompanies this brief.—Compare *Phillips* v. *Downer,* 135 F. 2d 521, 525-526 (2d Cir.); *United States* v. *Grieme,* 128 F. 2d 811 (3rd Cir.).

A case closely in point here is *United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky., Dec. 19, 1952), where the defendant was a member of the National Guard at the time of his registration and the filing of his original questionnaire. The board had deferred him because of his membership in that military organization. Following this he became one of Jehovah's Witnesses. He later filed claims for classification as a minister of religion and as a conscientious objector. The case was appealed to the National Selective Service Appeal Board, which classified him in Class I-A. The classification was set aside as arbitrary and capricious. Read at page 378.

The pivotal decision for the determination of issues raised in draft prosecutions is *Estep* v. *United States,* 327 U. S. 114. The Supreme Court there itemized certain things committed by a draft board "that would be lawless and beyond its jurisdiction." (327 U. S., at page 121) Read what the Court said about provisions of the act that make determinations of draft boards "final," at pages 121-123.

In note 14 of the *Estep* opinion (at page 123) the Court

says that the scope of judicial inquiry to be applied in draft cases is the same as that of deportation cases, and the Court cited *Chin Yow* v. *United States,* 208 U. S. 8; *Ng Fung Ho* v. *White,* 259 U. S. 276; *Mahler* v. *Eby,* 264 U. S. 32; *Vajtauer* v. *Commissioner,* 273 U. S. 103; *Bridges* v. *Wixon,* 326 U. S. 135. In this note the Court added that "is also the scope of judicial inquiry when a registrant after induction seeks release from the military by *habeas corpus.*" The Court concluded note 14 explaining the scope of judicial review by citing the opinion of the Second Circuit in *United States* v. *Cain,* 144 F. 2d 944 (2d Cir.).—327 U. S., at page 123.

In the *Estep* case, the Court said that, in reviewing draft board files, judges are not to weigh the evidence to determine whether the classification was justified. A court weighs the evidence only when there is some contradiction in the evidence. There must be some dispute before this burden falls upon the court to determine whether the classification is justified. The Court added, however, that if there is no basis in fact for a classification after a review of the file by a court, it would be the duty of the court to hold that the classification was beyond its jurisdiction.—327 U. S., at page 122.

There is no basis in fact for the classification in this case because there are no facts that contradict the documentary proof submitted by the appellant. The facts established in his case show that he is a conscientious objector to noncombatant service and, therefore, the classification given is beyond the jurisdiction of the boards.

The undisputed evidence shows that appellant is sincere in his objections. He is opposed to any form of participation in war by himself. This objection comes from an immovable belief in the Supreme Being. It is not based on sociological, political or philosophical beliefs. It is supported by the direct Word of God, the Bible. It is not a limited objection that he has. He is not willing to join the army as a noncombatant soldier or go in as a conscientious ob-

jector only to actual combat service. He objects to doing anything in the armed forces. He will not be a soldier.

It was well known to the Congress, the nation, the Government and the courts of the United States that Jehovah's Witnesses are conscientiously opposed to noncombatant military service. They were not unaware that these objections of Jehovah's Witnesses are based on a belief in the supremacy of God's law above obligations arising from any human relationship. These facts bring Jehovah's Witnesses within the plain words of the act. Twisting the words of the law and discoloring the act subvert the intent of Congress not to discriminate.

The strict construction of the act advocated by the Government and the court below was not intended by Congress; Congress had in mind a liberal interpretation of its provision for conscientious objectors to protect the religious objector. The records of the hearings in Congress, the reports and the act all prove a broad exemption was intended. Congress had in mind that objection to war is a part of the religious history of this country. Conscientious objection was recognized by Massachusetts in 1661, by Rhode Island in 1673 and by Pennsylvania in 1757. It became part of the laws of the colonies and states throughout American history. It finally became part of the national fabric during the Civil War and has grown in breadth and meaning ever since. (See Selective Service System, *Conscientious Objection,* Special Monograph No. 11, Vol. I, pp. 29-66, Washington, Government Printing Office, 1950.) So strongly was the principle of conscientious objection imbedded in American principles that President Lincoln and his Secretary of War thought that conscientious objectors had to be recognized. This is impressed upon us by Special Monograph No. 11, Vol. I, *supra,* at page 43: "At the end of hostilities Secretary of War Stanton said that President Lincoln and he had 'felt that unless we recognize conscientious religious scruples, we could not expect the blessing of Heaven.'"

As appears above, the Selective Service System in Special Monograph No. 11, Vol. I, carries the history far back, even before the American Revolution. (*Ibid.,* pages 29-35) Virginia and Maryland exempted the Quakers from service. (*Ibid.,* page 37) From the Revolution to the Civil War provision for exemption of conscientious objectors appears in the state constitutions. During the Civil War the military provost marshal was authorized to grant special benefits to noncombatants under Section 17 of the act, approved February 24, 1864. Lincoln was urged to force conscientious objectors into the army. He replied:

> "No, I will not do that. These people do not believe in war. People who do not believe in war make poor soldiers. . . . These people are largely a rural people, sturdy and honest. They are excellent farmers. The country needs good farmers fully as much as it needs good soldiers. We will leave them on their farms where they are at home and where they will make their contributions better than they would with a gun."—*Ibid.,* pages 42-43.

Congress certainly must have had in mind the historic national policy of fair treatment to conscientious objectors. The well-known governmental sympathy toward the Quakers and others was not ignored by Congress when the act was passed. Congress must have had in mind the historic considerations enumerated by the Supreme Court in *Girouard* v. *United States,* 328 U. S. 61. Read 328 U. S., at pp. 68-69.

In passing the provisions for conscientious objection to war in all the draft laws Congress had this long history in mind. It intended to preserve the freedom of religion and conscience in regard to conscientious objection, and it provided a law whereby such freedom could be preserved.

It is respectfully submitted, therefore, that the motion

for judgment of acquittal should have been sustained because the Department of Justice arbitrarily and capriciously recommended that White be classified I-A-O and the board of appeal so classified him, and for the further reason that there is no basis in fact for the denial of the full conscientious objector status claimed by White in his classification questionnaire and other documentary evidence. The trial court, therefore, committed reversible error when the motion for judgment of acquittal was denied.

POINT TWO

The court below committed reversible error when it refused to receive into evidence the FBI report and excluded it from inspection and use by the court and the appellant upon the trial of this case.

Upon the trial appellant subpoenaed the secret investigative report of the FBI. A motion to quash was made by the Government. This was denied. At the trial the court permitted the reports to be marked for identification and received as sealed exhibits after the trial court made an inspection of the exhibits. The trial court found the secret FBI report to be material but refused to permit them to be used as evidence.

The above point raised in this case is identical in every way to Point Four that is briefed and argued in the case of *Tomlinson* v. *United States,* No. 13,892, the case that is a companion to this one. All of the argument made in the brief for Tomlinson in that case at pages 19 to 20 and pages 41 to 53, applies here. It is hereby adopted and made a part hereof as though copied at length herein. Because these two cases are companion cases and identical in every respect, the Court is hereby requested to read and consider the argument made in the *Tomlinson* case which is applicable here.

The only difference between the question presented here and that involved in the *Tomlinson* case is that the hearing officer told White that all of the information in the secret FBI investigative report was favorable to him. White was led to believe and told by the hearing officer that there was no adverse evidence in it. The Government may argue, therefore, that because of this circumstance it was harmless error of the court below to refuse to permit the secret FBI investigative report to come into the record in this case. This is a plausible argument if it is accepted without a measure of caution. The weakness in the suggestion is that it assumes what the hearing officer said is true. The statement made by the hearing officer is impeached by his report that he made to the Department of Justice which was in turn accepted and forwarded to the appeal board. In his report he recommended against the full conscientious objector status.

Whether this recommendation was based on undisclosed adverse evidence in the FBI report or not is not made to appear. In any event, the fact that the FBI report was not received into evidence casts up upon the waters of speculation. Since the evidence was concealed and not allowed, it must be assumed that there was unfavorable evidence in the FBI report.

It is the responsibility of the trial court to determine whether or not there was any adverse evidence in the FBI report. He cannot shut his eyes or be blinded by the statement made by the hearing officer to White that there was no unfavorable evidence. The court, himself, should have received the FBI report into evidence and examined it and permitted it to be examined by the defendant to determine whether or not there was any adverse or unfavorable evidence in it that could have been or was relied upon as a basis for the denial of the conscientious objector claim.

What was said in *United States* v. *Packer,* 200 F. 2d 540 (2d Cir. Dec. 31, 1952), is applicable here. The court said:

> "It is true that in the case at bar the defendant was told that the FBI report was altogether favorable to him. But the correctness of such a representation was, in our opinion, a matter which the defendant was entitled to judge for himself by seeing the original FBI record."

While this case was reversed in *United States* v. *Nugent,* 346 U. S. 1, the statement just quoted is applicable here. It is authority for the assertion made here that it was up to the trial judge and the counsel for the appellant to judge for themselves as to whether or not a fair and adequate summary should have been made to White by seeing the original FBI record itself in the trial of this case in the court below.

It is respectfully submitted, therefore, that the trial court committed grievous error in excluding the FBI report in this case. The error was prejudicial to the appellant. The court should reverse the case and order it remanded so that the appellant can have a full and fair hearing in the trial court as to whether or not there was a fair and adequate summary of the secret FBI investigative report made to White at the hearing or whether such summary should have been made by the hearing officer when White requested it at the hearing. For this reason the case ought to be reversed and remanded for a new trial.

CONCLUSION

Wherefore the appellant prays that the judgment of the court below be reversed and the court ordered to enter a judgment of acquittal; or, in the alternative, appellant

prays that the judgment be reversed and the cause remanded for a new trial.

Respectfully submitted,

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